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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AZALEA MURRAY
Petitioner,
v.
BRUCE BABBITT, Secretary of the
United States Department of the Interior
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Publications Specialist Azalea Murray (plaintiff/appellant), a 57-year-old Afro-American female with an unchallenged, impeccable 32-year work record, was forcibly removed from her job April 24, 1992 for alleged "inability to perform a major duty" in a new Park Ranger job, forced upon her when her supervisor, Russell P. Smith, of the National Park Service (NPS), (Agent for defendant/appellee Bruce Babbitt), discovered Murray had medical problems. Her desk-oriented, sedentary duties were given to Ron Thomson, a younger Caucasian co-worker who sought travel accommodation so he could be at home more.

In 1990, Smith told Murray to "retire" if she did not agree with his extremely defamatory 1989 evaluation of her performance. Murray filed an Equal Opportunity (EO) complaint in 1990, and again in 1991 for an even more vicious 1990 performance evaluation.

Without Murray's knowledge, Murray's attorney and the judge agreed not to allow testimony or evidence regarding these and other earlier discriminatory acts, but narrowed the complaint to whether the new Park Ranger job required travel. This precluded an intelligent ruling on the circumstances of Murray's removal. Murray performed the major duties through improvisations, but sought official accommodation. Smith's only assignments or demands were for more and more travel for Murray.

The NPS' own Medical Officer rendered Murray a qualified handicapped employee and recommended accommodation, which the NPS refused, and instead ordered

Murray to leave Federal Service. Her replacement was Tom Davies, a 40+ years old majority male, friend of Smith's.

The U.S. Attorney recommended $130,000 settlement for Murray, which was never offered to her. Murray's lawyer did not represent her interests during the trial and abandoned the case after filing an appeal of the District Court's judgment.

1. Is there a causal link among Murray's three previous discrimination complaints, refusal of accommodation for her to perform heavy travel requirements assigned by Smith to the new Park Ranger job, and her removal from service?

2. Was the NPS guilty of intentional race, age, sex, and handicap discrimination and reprisal when Smith defamed Murray's 1989 and 1990 performance evaluations, with no explanations, and told her to "retire ... in October" if she did not agree with them?

3. Was it age discrimination and reprisal when Smith learned of Murray's age-related medical problems, transferred duties she could perform to a younger Caucasian male, forced her into a position for which Smith knew in advance she would require accommodation, then refuse accommodation?

4. Did the District Court err in its finding of no reprisals against Murray despite its disallowing testimony and evidence on defamatory performance evaluations and other discriminatory acts prior to Murray's forced removal?

5. Did the District Court err in narrowing Murray's original complaint of discrimination and reprisal to whether travel was essential to the new Park Ranger position?

6. Did the District Court err in allowing the showing to the jury of a video tape of uniformed field Park Rangers, which did not portray the Administrative Office Park Ranger position newly given to Murray?

7. Was it harassment and discrimination when Smith increased Murray's travel requirements from the normal two or three trips per year to an estimated 57 basic trips per year, with his full knowledge that Murray required travel accommodation?

8. Did the NPS discriminate against Murray by limiting its search for an alternative position for Murray to only the immediate office instead of Agency-wide, and not trying her in alternative positions?

9. Did the NPS discriminate in not discussing with Murray accommodation in the new Park Ranger position, and never specifying what hardships would ensue in accommodating Murray?

10. Did the District court err in its finding of no discrimination against Murray based upon disability even though the NPS' own Medical Officer rendered Murray officially handicapped?

11. Was it a violation of Murray's civil rights when she was not informed by the NPS of a proposed $130,000 settlement

during pre-trial discussions as recommended by the U.S. Attorney?

12. Did the District Court err in accepting Tom Davies' 1995 testimony of heavy travel (with his being the only traveler in the division in 1995), as opposed to the actual time he took Murray's job in 1992 when he was one of three travelers?

13. Did the District Court err in its finding of no age discrimination when Murray was replaced in her job by a younger, majority male with less experience in the profession than she, despite their both being members of the 40+ age protected class?

14. Should Murray be held liable for her former attorney's malfeasance and ineptitude during the trial and abandoning the case, without notifying Murray after the appeal was filed? The time limit elapsed but Murray's pro se motion to reopen the case was granted.

15. Did the NPS show discrimination and reprisal when it removed Murray in the middle of a pay period, defaulting on her sick and annual leave payments for the entire period?

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Americans with Disabilities Act of 1990 (42 U.S.C., 12117(a)

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 633a

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq., as amended by the Civil Rights Act of 1991

PETITION FOR WRIT OF CERTIORARI

Petitioner, Azalea Murray, a pro se litigant, residing in the Commonwealth of Pennsylvania, hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals judgment is included as Appendix A. (App. 1 - 2). The District Court's judgment in the case is included as Appendix B. (App. 3 - 4).

JURISDICTION

The Court of Appeals entered its judgment on December 23, 1996. Petitioner seeks to invoke the jurisdiction of this Court (28 U.S.C., Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This is a civil rights case in which there is clear violation of the Civil Rights Act of 1991 (which amends Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000(e) et seq. as amended); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a; the Americans With Disabilities Act (ADA) of 1990, 42 U.S.C., 12117(a) et seq.; and the Rehabilitation Act of 1973, 29 U.S.C. Sections 291, 501, 504, 505, and 794 a.

STATEMENT OF THE CASE

I. INTRODUCTION AND SUMMARY

The National Park Service (NPS), defendant/appellee, engineered a series of events resulting in plaintiff/appellant Azalea Murray's removal from Government service. Murray, a 57-year old, Afro-American female, with an unchallenged, impeccable 32-year work record, was forced to retire when her supervisor, Russell P. Smith, agent for Bruce Babbitt, Secretary of the Department of Interior, took away her duties as Publications Specialist, and assigned her the new position as Park Ranger. She was performing the major duties of the new job but Smith ordered exorbitant and unrequieted travel when he discovered that at age 57, travel was becoming a

problem for Murray for medical reasons. But for reprisals, and age, race, color, sex, handicap discrimination, and constructive removal, Murray would have worked until at least 60 years of age. A discriminatory reason more likely motivated the NPS to remove Murray from her job. The NPS' proffered explanation, that she had to be terminated because she allegedly could not travel is unworthy of credence. McDonnell Douglas Corporation v. Green, supra, at 804 - 805. Murray was (1) within the age group protected by the Age Discrimination in Employment Act (ADEA); 29 U.S.C. 633a; (2) was doing satisfactory work; (3) was discharged in spite of this; and (4) the position was filled by an employee younger than Murray.

Murray retired because she was forced to accept agency conditions, the circumstances permitted no other alternative, and the circumstances were created by agency acts. Maher v. Department of the Army, 90-3254 (DC Cir. 1992). Murray engaged in a protected activity. The NPS retaliated and took adverse action against her; and there is a causal link between the protected conduct and the adverse action (but for the protected conduct the action would not have been taken). Griffiths v. Cigna Corp., 988 F.2d, 457, 468 (3d Cir. 1993).

After Murray prevailed in a 1984 Civil Rights case against the NPS, reprisals began immediately and continued until the day of her removal in 1992. The NPS continued (1) to lower numerical ratings of her performance evaluations, to proffer untrue and slanderous, defamatory assessments of her performance (Murray challenged every defamatory evaluation through 1990 via the Equal Opportunity (EO) complaint process, which is the primary reason for NPS' retaliatory actions against her); (2) to harass, ostracize, threaten her, remove major duties, withhold data necessary for her to do her job; and, (3) to force a new position description upon her, containing at least one duty for which

NPS knew in advance she would need accommodation, refuse accommodation, then remove her for alleged "inability" to perform that particular duty. This violates the Rehabilitation Act of 1973, 29 U.S.C. Sections 501, 504, et seq.

Murray filed four EO complaints. On December 22, 1993, the NPS ruled in its own favor. Murray then sought relief through the District Court. Murray's attorney admitted that she and the judge agreed beforehand, without Murray's knowledge, to omit testimony and evidence pertaining to the first three of Murray's four EO cases cited in her original complaint, thereby narrowing the issue to whether or not travel, in a new position forced upon Murray, was an essential duty. Hence, no testimony was heard relating to previous acts of discrimination and reprisals against Murray, describing the oppressive and hostile work atmosphere in which Murray tried to work. The lawyer "forgot" to consider questions to be included in the "Special Interrogatories," and left data "back in (her) office," then relied solely upon input and guidance from the opposing party, to Murray's detriment. Fundamental error is found in the foregoing, as Murray's lawyer sat mute, and appellant was powerless to object before the jury retired. F.R. Civ. P. Rule 49(a); Anderson v. Cryovac, supra, 862 F.2d at 910, 917 - 918 (1st Cir. 1988); United States v. 564.54 Acres of Land, supra, 576 F.2d at 983 (3rd Cir. 1978); Frankel v. Burke's Excavating, Inc. supra, 397 F.2d at 167, 169 - 170 (3d Cir. 1968).

The distortion of Murray's original complaint weakened the connection between the hostile and discriminatory working conditions created by the NPS and her forced removal from service, via a new Park Ranger position. Murray had worked as a Publications Specialist, GS-12, since 1978, a basically sedentary, desk-oriented position. Travel is not listed under

major duties of the Park Ranger job description, Murray performed all of the major duties and asked for accommodation from heavy travel to light travel. Following are the four EO complaints filed by Murray in District Court.

II. FACTUAL BACKGROUND

A. FNP-90-051R - On March 2, 1990, Murray was given, by Russell P. Smith, her new supervisor and Agent for Bruce Babbitt, a written defamatory evaluation of her "fully successful" 1989 performance, numerically equating to just above "minimally successful." The NPS failed to show the rating standards it used were approved by the Office of Personnel Management, a fatal flaw. NATCA and Shuffler v. United States Department of Transportation, 91-3524 (3d Cir. 1992). Smith never notified Murray that her performance was in jeopardy. Murray attempted to discuss the evaluation. Smith prefaced his remarks with, "Why don't you leave? You can retire in October!" All of Smith's interactions with Murray from that point on indicated that he desired Murray's removal. Lynn v. Regents of the University of California, 656 F.2d 1337, 28 FEP Cases 410 (9th Cir., 1981). Smith refused to give any examples or explanations for the improperly low evaluation, so Murray filed an Equal Opportunity (EO) complaint against Smith.

Smith criticized Murray for circumstances over which she had absolutely no control: not providing funding for various projects, although she had no funding sources; that she worked only as assigned, although Smith gave her no assignments during the year; that Murray needed to be "more active than reactive," but provided no examples as to what he was referring; that Murray needed to learn office procedures,

all of which Murray was completely familiar from 30+ years in responsible positions; that field park rangers came to him for assistance instead of to Murray, but Smith could not name anyone who had bypassed Murray; Smith blamed Murray for the office secretary's responsibility to type reports before due dates, but he could give no examples of how Murray was remiss; Smith demeaned Murray's handling of office responsibilities she took upon herself to alleviate his workload so he could learn his new job, and numerous other unsubstantiated charges against Murray's performance.

In 1984, Murray prevailed in a discrimination suit against her former supervisor, Chester O. Harris, who refused her a legal promotion in a job normally held by Caucasian males. Harris instituted reprisals and harassments against Murray -- from nepotism (arranging for transfer of Murray's cooperating association -funded publications production assignments to his daughter, Chesley), to threats, ostracism from office operations, etc. After one of numerous extended visits between Harris and Smith behind Smith's closed doors, Smith told Murray, "Lea, I will not operate like Harris!" The inference was that no longer would Murray be subjected to continued harassment and stress and that she would finally work in a non-discriminatory and non-abusive working environment, to which she was entitled under the Civil Rights Act of 1991, which Amends Title VII of the Civil Rights Act of 1964. Ellison v. Brady, 89-15248 (9th Cir. 1991). But Smith continued where Harris left off.

When Murray did not travel in December 1990, because of severe back spasms, she described to Smith her medical problems in detail. Smith's immediate reply was, "You're going to travel!" Several other participants were unable to attend in 1990 also, with no adverse repercussions from their

supervisors. From that point on, Smith demanded ONLY travel duty for Murray.

Murray had heretofore performed her duties since 1984 utilizing regular mail, E-Mail, voice-mail, fax, telephone, photographs, films, video tapes, blueprints, local training, procuring and studying training materials (as she had arranged to do in December 1990), meeting with field park rangers in the office, procuring printing needs locally, utilizing computer programs, etc. These are the identical accommodations Murray requested for the new Park Ranger position in 1991. Travel was not required in any of the five or six jobs Murray held since 1960, although she travelled occasionally. Murray was only required to provide evidence sufficient to show reasonable accommodation was possible. Arneson v. Heckler (8th Cir 1989); 29 U.S.C. Section 794.

B. FNP-91-051R - On March 19, 1991, Smith gave Murray another defamatory evaluation of her "fully successful" 1990 performance, numerically equating to just above "minimally successful." Murray then filed an Equal Employment (EO) complaint because of the numerous untrue statements Smith made in the narrative of the evaluation. At no time during the year did Smith complain or discuss with Murray any performance deficiencies. NPS failed to show that their rating standard had been approved by the Office of Personnel Management, a fatal flaw. NATCA and Shuffler v. U.S. Dept. of Transportation, 91-3524 (3d Cir. 1992).

In the written narrative Smith cited 14 unsubstantiated allegations of ineptitude in duties Murray had performed since 1978. Smith refused to discuss the evaluation. On April, 30, 1991, at Murray's request, she met with Smith and

his supervisor, Associate Regional Director Joseph P. Miller. Smith had no supporting documents and refused to correct any of the allegations against Murray, despite Murray's documentations and proofs to refute all 14 of Smith's charges against her. Miller suggested Smith change only one of the errors, equating Murray's performance to the 1989 level. NPS gave Murray a discriminatory evaluation, but refused her a reasonable opportunity to inspect and have the evaluation corrected, in violation of the Civil Rights Act of 1991; and Stoller v. Marsh, 682 F.2d, 971, 29 EPD (DC Cir., 1982).

Smith accused Murray of doing well only in recurring tasks (of which the position is composed, but Murray's creativity and initiative assured finished reports, booklets, photo displays, exhibitry, etc.); claimed Murray did not respond to one memorandum of the 60 or more she responded to each year; claimed Murray was late for one report, but could not name which report of the more than 50 Murray prepared each year; accused Murray of initiating a printing project without first surveying the need (which is the only possible way to begin production for a leaflet, trail guide, slim jim folder, booklet, etc.); claimed Murray could not provide the name of an artist (despite Smith's knowledge that Harris had arranged for his daughter, Chesley, to handle all funded publications production by then. Murray no longer worked with artists, but used "clip art," photos, and computer designs, and now kept records of Harpers Ferry Center publications progress , wrote and edited copy for park funded publications, and worked with special emphasis programs, such as Boy Scouts, Take Pride in America, Education Initiatives, park audiovisual and media repair, volunteer programs, the Handicap Accessibility program, etc.

On February 12, 1990, Ron Thomson, a majority male, was selected by Smith as a member of Smith's Regional Office staff. Thomson transferred from Independence Park, across the street, to the administrative office in which Smith worked. Thomson replaced George Mackenzie, an elderly majority male, who retired after 45 years of service at about 70 years of age. Smith rewrote Mackenzie's job description after Mackenzie retired, but Smith rewrote Murray's position with her still in it, ignoring her request for accommodation in the Park Ranger job. Mackenzie was accommodated by Smith's allowing Mackenzie's wife to accompany Mackenzie on trips and driving for him at times.

Thomson became disgruntled with his travel assignments when he saw Murray rarely travelled as Publications Specialist. Smith began transferring most of Murray's desk-oriented duties to Thomson despite Murray's complaints. More than 50 documents proving these transfers were disallowed at District Court because of Murray's lawyer's negligence. Smith and Thomson began rewriting Murray's position description as Park Ranger with onerous travel requirements. Murray began receiving unsolicited travel assignments, demands for numerous doctor's reports, threats of and actual suspensions, threats of removal, and orders to cease meetings with EO and Union officials who tried to advise and assist Murray, as was her right as a Union member. Employees covered under labor contracts have the right to consult a Union representative before any actions that might lead to discipline. It is an unfair labor practice for NPS to bypass a Union local and deliver grievance decisions, disciplinary actions, and responses directly to grievant. United States Postal Service v. National Labor Relations Board, 91-1373 (DC Cir. 1992).

Smith ordered Murray to cease using certain office equipment. Information needed to do her job was withheld by Smith and Thomson. Travel accommodation was withheld; a 30-year Service plaque was withheld. Smith refused input or specifications for the one and only assignment Smith ever gave Murray, outside of travel, with an impossible deadline. He then threatened to villify her next performance evaluation if she could not complete the assignment without necessary data from him, which he refused to give. Smith refused local training for Murray, even when it was available, and he and Thomson refused to cooperate with Murray on job- related projects. Murray was ostracized from meetings and acting assignments, etc.

Smith, Thomson, and personnellists developed a new Park Ranger position, and Murray was reassigned on March 10, 1991. Because Smith had been so ruthless in his evaluations of Murray's 1989 and 1990 performances, in duties with which Murray was completely familar, she feared his evaluations in a new job with a duty for which Smith already knew beforehard Murray would need an accommodation. But for her race and age the decision to rewrite the job and ask her to retire would not have been made. Billet v. Cigna Corporation, 940 F. 2d 812, 815 (3d Cir. 1991).

When deciding whether Murray is eligible for occupations-related benefits, such as accommodation, evidence about actual duties of the job outweighs general policies on how the job is usually classified. The job could have been redesigned to accommodate Murray. To refuse to consider or to do otherwise is blatant discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981); Perske v. Ofice of Personnel Management, 93-3511 (DC Cir. 1994).

Accommodations are normally provided in the NPS without fanfare to comply with personal and career needs. Smith himself was accommodated in his request for transfer from a field area in West Virginia to the Philadelphia area to be near his elderly parents. NPS did not meet its burden of showing it reasonably attempted to accommodate Murray's handicap. Carter v. Bennett, 651 Supp 1299, 42 BNA, FEP Cas 1582, (DC Cir. 1987).

On February 21, 1991, Smith gave Thomson an "Outstanding" 1990 performance evaluation, with a Quality Step Increase Award, with no written narrative! Conversely, Smith always gave Murray pages and pages of defamatory and unsubstantiated comments about her performance in duties with which she was completely familiar. This is intentional discrimination against Murray. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981); U.S. Postal Service Board of Governors v. Aikens, 51 U.S.L.W. 4354 (April 4, 1983); and McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Massarsky v. General Motors, Corporation, Nos. 82-5176 & 82-5177, (3d Cir. 1983).

C. FNP-91-093R - Smith failed to attempt or offer any type of accommodation for Murray in the new Park Ranger position, but harassed her continually with inordinate travel requests, so she filed a third EO complaint on July 23, 1991. Smith did not consider Murray's abilities in performing job's essential functions, nor whether reasonable accommodation of light travel in lieu of heavy travel would have enabled Murray to perform the job to Smith's satisfaction. Hall v. U.S. Postal Service, (6th Cir. 1988); 29 U.S.C., section 794.

Murray was only required to provide evidence sufficient to show reasonable accommodation was possible. Arneson v. Heckler (8th Cir. 1989); 29 U.S.C., Section 794.

On May 17, 1991, Murray's physician, Dr. Frank Delia, provided a note to Smith requesting light travel, and enumerated Murray's maladies: osteo-arthritis in right shoulder, thumbs, both knees; lumbar discogenic syndrome, chronic lower back pain; peripheral vascular disease; anxiety states; incontinence; acute insomnia; hypertension/cardiomyopathy - high blood pressure; palpitations (panic attacks); and Shamberg's Disease. But Smith continued insisting upon travel and submitting Murray's name for travel without her knowledge, then threatening and suspending her when she could not comply. The Union representative asked Smith to cease harassment until NPS' Medical Oficer, Dr. Mariano Pimentel, ruled on Murray's disability and request for limited travel accommodation. Smith indicated via memorandum that he expected Murray to take at least 57 basic trips per year (up from the normal one or two). Smith indicated Murray must travel despite her medical condition and need for accommodation.

On July19, 1991, Smith sent Murray a letter of warning, indicating she would be disciplined for not travelling. No Union representative was present, as Murray requested and which was her right. Employees covered under labor contracts have the right to consult a Union representative before any actions that might lead to discipline. It is an unfair labor practice for NPS to bypass a Union local and deliver grievance decisions, disciplinary actions, and responses directly to grievant. United States Postal Service v. National Labor Relations Board, 91-1373 (DC Cir. 1992).

On July 22, 1991, Dr. Delia provided more information, regarding Murray's medical status, again requesting limited travel. Smith continued to divert Murray's desk-oriented duties to Ron Thomson. Both Smith and Thomson continually refused cooperation with Murray on job-related projects. Murray continued to telephone and write, on at least five occasions, to Dr. Delia and Dr. Pimentel, giving them total permission to give and receive any data pertaining to her medical condition.

Smith ordered Murray to attend an "Interpreting Slavery Workshop," so she could "learn how slaves act and feel." No Union representative was present during this meeting as Murray was entitled to have during all aspects of this process. United States Postal Service v. National Labor Relations Board, 91-1373 (DC Cir. 1992). Smith gave Murray a one-day suspension notice when the Union representative advised her to await NPS Medical Officer Dr. Mariano Pimentel's decision regarding her request for accommodation, before taking on the challenging travel regimen Smith had concocted for her. The Union representative saw Smith's oppressive and incessant demands for travel duty for Murray as harassment and discrimination, for no other employee was mistreated like this. The Union representative advised Murray to write again to Dr. Delia, pleading with him to send quickly, to the NPS, all information requested in Smith's memorandums to stave off continued harassment and possible suspension. This Murray did on September 6, 1991, imploring Dr. Delia's full cooperation with the NPS.

Murray requested desistance of the proposed suspension and suggested various ways she could be accommodated in the Park Ranger job, such as the kinds of improvisations she utilized in the Publications Specialist job: use of E-Mail, voice-mail, fax, telephone, photographs, films, video

tapes, blueprints, local training, procuring and studying training materials, meeting with field park rangers in the office, etc. but NPS never discussed accommodation, restructuring of the job, or placement of Murray in a comparable position. Murray was only required to provide evidence sufficient to show that reasonable accommodation was possible. Arneson v. Heckler, (8th Cir. 1989).

On October 30, 1991, an 18-page medical report from Dr. Delia arrived with a cover memorandum requesting light travel for Murray. Smith ordered travel in spite of the report. The one-day suspension was carried out November 14, 1991, and Murray lost a day's pay.

In a November 21, 1991 letter to Dr. Pimental (NPS' Medical Officer), Murray again gave him total permission to receive and request any and all information he desired from her physician, Dr. Frank Delia. Murray also again authorized Dr. Delia, to respond to all requests for information from Dr. Pimentel.

On November 22, 1991, Murray, upon receiving notice of a proposed 14-day suspension, requested that Miller cancel the suspension. Murray utilized the identical justification for desistance of the 14-day suspension that she did for the one-day suspension. Miller allowed the one-day suspension, but cancelled the 14-day suspension. This was an extremely stressful time for Murray for no such discipline or threats had ever been taken against Murray in 32 years of service. NPS' treatment of Murray was radical as well as discriminatory. Smith never complained of Murray's day-to-day work performance throughout the year.

A December 17, 1991 memorandum from Dr. Pimentel rendered Murray a qualified handicapped employee within the meaning of Section 501(b) of the Rehabilitation Act of

1973, and recommended that Murray be afforded accommodation, placed in a new position, or given disability retirement. NPS did none of these as required by law. Failure to provide reasonable accommodation for a qualified handicapped employee violates the Rehabilitation Act of 1973. Murray was qualified for the new Park Ranger position under all but the challenged travel criteria, which Murray could satisfy with reasonable accommodation. Section 501(b) of the Rehabilitation Act of 1973 requires the federal government to affirmatively make reasonable work place accommodation for Murray, a handicapped employee. The burden of proving inability to accommodate is on NPS, who never gave Murray a chance to prove her ability. Prewitt v. U.S. Postal Service, 622 F. 2d, 292 27 EPD, Section 32, 251 (5th Cir. 1981). Murray was only required to provide evidence sufficient to show that reasonable accommodation was possible. Arneson v. Heckler, (8th Cir. 1989); Statute 29 U.S.C., Section 794a.

On January 27, 1992, Smith, again disallowing Union representation, called Murray into his office and handed her a memorandum entitled, "Proposed Removal." The NPS claims to have considered Murray for positions such as civil engineer, landscape architect, forestry technician, etc. Murray should have been placed in a position as close to the one denied, even if it meant "bumping" someone who had nothing to do with the discrimination. Lander v. Lujan, 89-5014 (DC Cir. 1989). NPS failed to sufficiently accommodate Murray, where more firm commitment by NPS could have avoided Murray's termination. Rhone v. U.S. Department of the Army, 665 F. Supp. 734 (ED Mo. 1987). Also, Murray had priority rights over her replacement, Tom Davies, and has claims to a position over anyone else who may be brought in by certain types of new appointments,

transfers, or re-employment. Curtius v. Merit Systems Protection Board, 91-3477 (3d Cir. 1991). Murray should have been tried in different positions to accommodate her claim of handicap discrimination. Rosiak v. U.S. Department of the Army, 679 F. Supp. 444, 46 BNA FEP CAS 989 (3d Cir. 1987).

No alternative employment opportunities were considered, or restructuring of the job, as required by the Rehabilitation Act of 1973 (29 USCS, Section 701 et seq.). Murray performed the essential functions of the job, and the change of heavy travel to light travel would not have imposed any undue hardship upon the NPS. NPS made no valid claims to the the contrary. Langon v. Department of Health and Human Services, 90-5300 (DC Cir. 1992).

NPS limited its efforts to finding a comparable position for Murray to only the immediate office, but the search should have been agency-wide. The search was not even extended to Independence Park, right across the street, from which Smith had made so many selections for his staff to accommodate their particular needs. Evans v. Department of the Navy, 93-3174 (DC Cir. 1993).

Joseph Miller, Smith's supervisor, asked Murray, via a memorandum, for additional "necessary information" from Dr. Delia (again with no Union representative present). Dr. Delia said to Murray, over the telephone, that he had absolutely nothing else to provide to the NPS. Murray notified Miller in writing.

Murray received the final removal decision via certified mail on April 22, 1992, telling her to leave the premises by April 24, 1992. Murray, a qualified handicapped employee, was terminated by NPS' discriminatory practices. Her removal by NPS was motivated by her handicap, causing handicapped related disparity, regardless of NPS' proffered

excuses or intent. Guinn v. Bolger (DC Cir. 1984) and Section 501 of the Rehabilitation Act of 1973. Murray had no other alternative but to retire. Permanent denial of job tenure protection afforded other employees solely because of employee's handicap violates Section 501 of the Rehabilitation Act of 1973, 29 U.S.C., Section 791 (b); Shirey v. Devine, 216, APP, 670 F2d 1188 (DC Cir. 1982).

Murray underwent the embarrassing procedure of Employee Checkout, in which she had to tell each employee, with whom she worked directly, that she was forced from a position in which she and they thought she excelled. In addition to this humiliation, Murray was denied a 30-year plaque and retirement luncheon. Being forced out is likened to the pain, suffering, defamation and humiliation of being fired from a long-term job. Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546 (DC. Colo, 1985). Murray suffered intense emotional and physical trauma which continue to this date. NPS' removal of Murray was not done in good faith, and was of no benefit to Murray. It was illogical to change Murray's position, with a duty for which the NPS knew in advance she would need an accommodation, refuse her that accommodation, then fire her. Travel was not listed among the major duties of the job in the Park Ranger job description.

D. FNP-92-093R - On April 28, present 1992, Murray filed the fourth EO complaint based upon her forced removal. Murray cited age, race, color, sex, reprisal and handicap discrimination. NPS removed Murray for alleged inability to travel in the new position. This was a discriminatory reason for removing her from duty, and lacks credibility given the fact that job restructuring is done regularly for NPS

employees. But for her age and race the decisions to rewrite the job and force Murray to retire would not have been made. Billet v. Cigna Corporation, 940 F.2d 812, 815 (3d Cir. 1991). NPS' reasons for removing Murray are only proffered explanations, unworthy of credence, and are all pretexts for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981).

Travel in the new Park Ranger position description was the only aspect of Murray's original complaint heard at the District Court trial. The trial court's rulings were incorrect and the errors are harmful. Frankel v. Burke's Excavating, Inc., 397 F.2d 167, 169-170 (3d Cir. 1968). Murray was a handicapped person, otherwise qualified for the Park Ranger position, and was adversely treated solely because of her handicap. Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993).

The NPS utilized a marginal or tangential function -- travel -- as the concocted reason to render Murray unqualified to hold the new job. Without any contradiction, Murray was performing the major, essential duties of the job, and could have easily been accommodated without any harm to the Government, had the NPS wanted to utilize her talents, skills, and experience.

A biased video tape was shown to the jury during the District Court trial, which did not portray the actual duties performed by Murray. The tape showed uniformed park rangers in outdoor settings, travelling constantly from all points within the park, while the position Murray held was an administrative office-oriented position with occasional travel. None of Murray's duties (preparatiion and review of scripts, production of interpretive media, such as exhibits, signs, audiovisual programs, etc.) were portrayed on the tape. Murray's lawyer did object to the tape during the trial, but the

judge allowed it to be shown. The opposing party confessed that the tape did not portray Murray's job, but the showing of the tape more than likely left an erroneous impression in the minds of the jurors, and influenced their opinion that travel was essential to Murray's job. This lost the case for Murray, as the first question in the judge's charge was whether or not travel was essential to the job. A "Yes" answer prohibited the jury from going any further with other questions in the special interrogatories or claims of discrimination in Murray's original charge.

Tom Davies' 1995 testimony that he had to do an inordinate amount of travelling was erroneous. The fact is that travel by the four-member 1992 staff (at the time of Murray's removal), had been reduced to only one traveller in the division (Davies) at the time of the 1995 trial. This gave an erroneous depiction of the actual amount of travel required by the park ranger position Davies held in lieu of Murray in 1992. Because Smith's intent was to remove Murray, he would of course testify that travel is essential to the administrative office park ranger position, whether it was or not. Smith's actions were not accidental, but specifically intended to discredit Murray and to force her removal. Rogers v. International Paper Co., 510 F.2d 1340, 9 EPD, Section 865 (8th Cir. 1975). The position Murray left had always been encumbered by a white male, and field park rangers were anxious for a chance at it. Indeed, it was because of its great appeal as a choice administrative position that Murray was continually harassed by her supervisors. NPS more than likely felt the position was too good for a minority female, in violation of the Civil Rights Act of 1991. Smith retaliated against Murray for filing EO complaints against him, and that was one of the prime motives behind

his forcing Murray from service. Ramey v. Bowsher, 87-5305 (DC Cir. 1990).

Statistically, of 55 professional employees in NPS' Philadelphia Regional Office Management and Operations Division. Murray was the only (and probably the first and last) Afro-American GS-12 professional, and that only by 1984 court order. This statistical imbalance is true throughout the NPS System. A prima facie case of disparate impact can be shown by statistical indicia. Crocker v. Boeing Co. 662 F.2d 975, 26 FEP Cases 1569 (3d Cir. 1981). This is an independent basis for recovery under Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) et seq., as amended by the Civil Rights Act of 1991.

There is a wage disparity between Afro-American and majority employees at the NPS. A disproportionate number of Afro-American employees are in the lower grades (GS- 2 - GS-7). However, since Murray's constructive removal, the NPS has promoted numerous Afro-Americans up to GS-12 without their even seeking promotions, but all deservedly so. This was to strengthen the NPS' District Court case. The NPS has a long-standing reputation for discrimination against women and minorities.

According to NPS' May 26, 1995 Management and Operations Division Staff Notes in Appendix C (App. 5 - 6), the U.S. Attorney's Office had "recommended settlement at $130,000" for Murray, who never received the offer. This offer reveals NPS' implied guilt, and would have covered some of the damage done to Murray.

III. PROCEDURAL HISTORY

At the District Court jury trial, defendant/appellee Bruce Babbitt, through his agent, National Park Service (NPS), advanced two primary arguments. First, that travel was an essential duty in the new Park Ranger position given to plaintiff/appellant Murray. Both parties agreed that travel was not listed under major duties in the new Park Ranger job description, and there was no dispute that Murray was performing the major duties as listed. However, the NPS insisted that Murray's inability to carry out the initial heavy travel assignments given to her by her supervisor, Smith, rendered her incapable of performing the entire job.

Second, the NPS argued that Murray, although rendered a qualified handicapped employee by the NPS' Medical Officer, could not be accommodated in any possible way to assure her tenure as an employee. NPS had prior knowledge of Murray's medical problems long before her assignment to the new Park Ranger position. Her former desk-oriented Publications Specialist duties were given to a younger, majority male co-worker.

On May 25, 1995, the U.S. District Court for the Eastern District of Pennsylvania ruled in favor of the NPS. On December 23, 1996, the U.S. Court of Appeals for the Third Circuit sided with the District Court's judgment. There were no written opinions for either Court's decision. Murray then filed this petition for certiorari. None of the errors committed in District Court and cited in Appellant's Brief, were recognized by the Appeals Court as violations of Murray's civil rights.

REASONS FOR GRANTING THE WRIT

THE ISSUE PRESENTED HERE IS IMPORTANT BECAUSE THE THIRD CIRCUIT'S DECISION ALLOWS A FEDERAL AGENCY TO DEFINE THE CIVIL RIGHTS ACT OF 1991 AND THE REHABILITATION ACT OF 1973 TO SUIT ITS OWN DEVICES, PERPETUATING INTENTIONAL DISCRIMINATION AGAINST A FEDERAL EMPLOYEE, WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

I. THE THIRD CIRCUIT'S JUDGMENT ERRONEOUSLY CONFIRMED THE DISALLOWANCE OF TESTIMONY AND EVIDENCE ON THE FIRST THREE OF FOUR EQUAL OPPORTUNITY (EO) CASES MURRAY PRESENTED IN HER ORIGINAL COMPLAINT.

The rejected testimony and evidence described the hostile work environment in which Murray worked. Murray was not aware of the rejection until the day before the trial, when Murray's attorney informed her the judge wanted to hurry the case along, and did not want to "hear all that junk!" Murray was powerless to counteract the destruction of the connection between the hostile work environment and the forced removal from her job. A non-hostile work atmosphere is a valid condition of employment according to Title VII as amended by the Civil Rights Act of 1991.

The District Court, thereby, narrowed Murray's complaint of age, race, color, sex, handicap discrimination and reprisal, to whether travel was an essential duty in the new Park Ranger position assigned to Murray. Exhibits presented in court clearly show NPS was fully aware of Murray's

handicapping condition prior to their assigning her to the travel-laden Park Ranger position. NPS did not present any evidence that reasonable accommodation was not possible, and refused any accommodation for Murray. Hall v. United States Postal Service, 857 F.2d 1073, 47 BNA FEP Cas 1540, 47 CCH EPD, Section 38327 (6th Cir. 1988).

The Third Circuit erroneously affirmed the arrangement of the questions in the "Special Interrogatories," with the question of travel requirements in the new Park Ranger job placed first, completely obliterating the foregoing discriminatory acts of harassment and reprisals brought to court in Murray's original complaint. The jury was instructed to go no further in deciding Murray's case if their answer to the first question was "Yes." Based upon the biased video tape, which did not depict Murray's duties, the jury was lead to render a "Yes" response, and Murray lost the case. This decision violates the Rehabilitation Act of 1973 which provides for the accommodation of a qualified handicapped employee, which Murray was.

II. THE THIRD CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S DECISION FAILED TO SETTLE SPECIFIC IMPORTANT QUESTIONS OF FEDERAL LAW RELATING TO AGE, RACE, COLOR, SEX, HANDICAP DISCRIMINATION AND REPRISAL, WHICH SHOULD BE DECIDED BY THE SUPREME COURT.

NPS discriminated against Murray because of her age, race, color, and sex when she was given defamatory written narratives of her performance whereas Caucasian male co-

workers were not given written accounts of their performance. The NPS discriminated against Murray when Smith, her younger, majority male supervisor, told her to retire if she did not like his defamatory evaluations of her work. Murray's position was changed during her incumbency, while Caucasian males' jobs were not changed until they had vacated their positions. A younger Caucasian male was given Murray's desk-oriented Publications Specialist duties to accommodate his desire to spend more time at home, while Murray was ordered exorbitant travel. Murray was forced to retire at age 57, and a younger, less qualified Caucasian male was assigned to her position, which was never before held by an Afro-American. All of these discriminatory acts violate Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991.

NPS discriminated against Murray because of her age and physical limitations when it refused accommodation for her despite recommendation of its own Medical Officer, who declared Murray a qualified handicapped employee. But NPS refused the recommended accommodation and removed her from the job instead. NPS never discussed accommodation with Murray even though she wrote a memo suggesting numerous ways she could be accommodated. NPS is in violation of the Rehabilitation Act of 1973, 29 U.S.C. Sections 501, 701, et seq., and 794a, which guarantee accommodation for a qualified handicapped employee as Murray was.

The NPS reprised against Murray because of her filing Equal Opportuity (EO) complaints and aggressively following though with deadlines, in the form of nepotism, withholding of data necessary to complete assignments,

denial of cooperation in job-related tasks, ostracism from office operations and acting assignments, transferral of duties to younger Caucasian males, defaming of her job performance and work habits, etc. The jury ignored the circumstances preceding Murray's removal from service.

The NPS's removal of Murray in the middle of a pay period, thereby obliterating her receipt of both sick and annual leave for the entire period, shows malice and reprisals on the part of the NPS.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted, and the decision of the Third Circuit reversed.

Respectfully submitted,

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February 20, 1997

APPENDIX A - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 23, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1622

AZALEA MURRAY,
Appellant.

v.

BRUCE BABBITT, SECRETARY OF
THE DEPARTMENT OF THE INTERIOR

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Action No. 94-cv-00692)
(District Judge: Honorable James T.Giles)

Submitted Under Third Circuit LAR 34.1(a)
December 19, 1996

Before: STAPLETON, ROTH, and WEIS, Circuit Judges

App. 2

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the

district court entered on May 25, 1995, be and is hereby affirmed.

Costs to be taxed against appellant.

By the Court,

"s/ Jane M. Roth".
Circuit Judge

Attest:

"s/ P. Douglas Sisk"
P. Douglas Sisk, Clerk
Dated: December 23, 1996

APPENDIX B - JUDGMENT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MAY 25, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AZALEA MURRAY	:	CIVIL ACTION
	:	
	:	
	:	
v.	:	
	:	
	:	
BRUCE BABBITT, Secretary of	:	
the Department of Interior	:	No. 94-0692

JUDGMENT

AND NOW, this 24th day of May, 1995, in accordance with the Jury's Answers to Special Interrogatories on the claims of Rehabilitation Act violations and retaliation (Title VII), and in accordance with the Court's bench opinion on the claim of age discrimination, JUDGMENT is hereby entered in favor of defendant, Bruce Babbitt, and against plaintiff, Azalea Murray, on all claims asserted in plaintiff's complaint.

BY THE COURT:

"s/ James T. Giles"
J.

FILED

May 25, 1995

By "s/ Michael E. Kunz, Clerk"
Deputy Clerk

APPENDIX C - NATIONAL PARK SERVICE STAFF NOTES SUMMARIZING MAY 22- 24, 1995 DISTRICT COURT TRIAL OF MURRAY V. BABBITT

MANAGEMENT & OPERATIONS
Information Bullets for week ending 5/26/95

- Last Wednesday (May 24), a jury in Federal District Court in Philadelphia decided in favor of the government in the case of Azalea Murray v. Bruce Babbitt.

Ms. Murray had been an employee in the Division of Interpretation & Visitor Services in the Mid-Atlantic Region until April of 1992 when she was terminated because she was unable to perform the travel portion of her job as (Park Ranger) Interpretive Specialist -Media. She had filed three discrimination complaints which had been rejected at lower levels, but which were appealed to the District Court.

The issues to be decided in this case were:

- discrimination based on disability (decided by the jury.)
  reprisal for filing EO complaints (decided by the jury.)
  discrimination based on age (decided by the judge.)

The judge limited the number of witnesses. He told the attorneys when the trial opened on Monday, May 22, that he wanted the case to go to the jury by Wednesday. Witnesses called were: For the plaintiff - Azalea Murray, Russell Smith.

For the government - Russell Smith, Ron Thomson, Tom Davies, Jim Brown, Sue Montgomery, Roy Graybill, and Jeannette Reinhart. After three days of testimony, both the judge and jury (which was out only 45 minutes) decided there had been no discrimination and, consequently, there were no damages.

The judge in his charge to the jury told them that the primary issue was whether travel was actually required by the job and whether Ms.Murray could have been accommodated in THAT job. Even though the Park Service had looked at other jobs in order to accommodate Ms. Murray, there was no obligation to do so.

While rendering his decision on the age issue, the judge went on to comment on other EO complaints already set aside. In short, he found them to be groundless. In doing so, he added more findings of fact to the case, making an appeal more difficult, if not impossible.

(As a sidelight, the U.S. Attorney's Office had recommended settlement at $130,000 four weeks before. As late as Tuesday, the plaintiff was asked by the judge whether she would settle for $20,000. She refused.)